

# **TERRORISM: DOES IT JUSTIFY ENHANCED INTERROGATION TECHNIQUES?**

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## **Abstract**

*In response to the questionable legality and public outrage over enhanced interrogation techniques, such as waterboarding, the United States government has recently tried to take steps to curb the negative publicity certain interrogation techniques have brought upon the United States.*

*In order to further emphasize adherence to domestic and international law, Congress passed the Detainee Treatment Act of 2005, which prohibits the "cruel, inhuman, or degrading treatment or punishment" of detainees and provides for "uniform standards" for interrogation. Additionally, Army Field Manual 34-52 for Intelligence Interrogation was replaced in September 2006 by Army Field Manual 2-22.3 Human Intelligence Collector Operations. President Obama further widened adherence to the Army field manual by making its interrogation regulations also apply to any official, agent, or organization of the United States government during times of armed conflict. Through Executive Order 13491, President Obama officially stated that interrogation techniques not listed in the United States Army field manual are banned for use in intelligence operations.*

*This article will attempt to answer whether U.S. interrogation techniques could constitute as torture. First, this paper will briefly analyze the interrogation procedures initially used at Guantanamo. Second, this article will briefly analyze the current interrogation techniques allowed during times of armed conflict, as found in the current Army field manual. Lastly, this article will explore why questionable techniques hurt a nation politically even if considered "legal" domestically.*

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## Introduction

In accordance with his call for more governmental transparency, President Obama recently released four Bush-era memorandums that detailed the enhanced interrogation techniques used by CIA officials on at least 28 detainees.<sup>i</sup> These memorandums reignited the public outrage which initially occurred when information was leaked during the Bush administration. The technique that sparked the most controversy amongst critics was water-boarding<sup>ii</sup> Water-boarding occurs when an individual is bound securely to an inclined bench with the feet raised and head placed slightly lower than the feet.<sup>iii</sup> A cloth saturated with water or a saline solution is then placed over the nose and mouth,<sup>iv</sup> which restricts air flow causing the prisoner to feel as if he is about to drown.<sup>v</sup>

Enhanced interrogation techniques are obviously controversial. First, confessions gained via this technique are questionable. For instance, Ibn al Shaykh al Libbi, after two weeks of enhanced interrogation, made false statements designed to tell his interrogators what they wanted to hear. He had been subjected to progressively harsher techniques and finally broke after being subjected to water-boarding and then left to stand naked in his cell overnight where he was doused with cold water at regular intervals. His statements became the basis for the Bush administration's claims that Iraq trained al Qaeda members to use biological weapons. Sources have revealed that al Libbi had no knowledge of such training or weapons and fabricated the statements because he was terrified of further harsh treatment. One CIA source said, "this is the problem with using the water-board. They [the prisoners] get so desperate that they begin telling you what they think you want to hear."<sup>vi</sup> Second, the legality of water-boarding in itself is highly suspect. According to a 2003 classified report, water-boarding "appeared to constitute cruel, and degrading treatment under the (Geneva) conventions."<sup>vii</sup> Senator John McCain, a former POW who was tortured by his North Vietnamese captors, also declared that the water-boarding technique is a "very exquisite torture" that should be outlawed.<sup>viii</sup> Further, many human rights organizations have stated that water-boarding constitutes as torture because it is the intentional infliction of severe mental pain/suffering.<sup>ix</sup> Many U.S. citizens also echo this sentiment. A poll conducted in 2007 showed that 69 percent of U.S. citizens believed water-boarding is torture, and 58 percent believed it should not be used on detainees.<sup>x</sup>

In response to the questionable legality and public outrage over enhanced interrogation techniques, the U.S. government has tried to curb the negative publicity the techniques have brought upon the U.S. To further emphasize adherence to domestic and international law, Congress passed the Detainee Treatment Act of 2005, which prohibits the "cruel, inhuman, or degrading treatment or punishment" of detainees and provides for "uniform standards" for interrogation.<sup>xi</sup> Additionally, Army Field Manual 34-52 for Intelligence Interrogation (AFM 34-52) was replaced in September 2006 by Army Field Manual 2-22.3 Human Intelligence Collector Operations (AFM 2-22.3). The new field manual removed the use of questionable interrogation techniques and specifically prohibited the military from water-boarding individuals.<sup>xii</sup> President Obama further widened adherence to the Army field manual by making its regulations apply to any official, agent, or organization of the U.S. government during times of armed conflict.<sup>xiii</sup> Through Executive Order 13491, President Obama officially stated that interrogation techniques not listed in the Army field manual are banned for use in intelligence operations.

In response to the recent developments transpiring in the field of interrogation, this article will attempt to answer whether U.S. interrogation techniques could constitute as torture. First, this paper will briefly analyze the interrogation procedures initially used at Guantanamo.<sup>xiv</sup> Second, it will analyze the current interrogation techniques allowed during times of armed conflict, as found in the current Army field manual. Lastly, it will explore why questionable techniques hurt a nation politically even if considered “legal” domestically.

## **What is Torture?**

Before one can analyze the legality of U.S. interrogation techniques, he or she must first know what constitutes as torture under international and domestic law.

### ***a. International Law***

Torture is best defined and strongly prohibited under international law.<sup>xv</sup> In 1975, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>xvi</sup> In 1984, the General Assembly also adopted the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) by consensus.<sup>xvii</sup> The language of the resolution indicated that CAT codified an already “existing prohibition under international law.”<sup>xviii</sup> It further stressed and solidified the notion that torture is banned under customary international law and that the prohibition of torture had risen to the level of a *jus cogens* norm that is binding on all states.<sup>xix</sup>

While there are numerous important international treaties and documents covering torture and cruel, inhuman, or degrading treatment, CAT has become the “benchmark reference” for torture.<sup>xx</sup> It defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>xxi</sup>

CAT further requires state parties to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.”<sup>xxii</sup> Moreover, Article 2 states: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency,

may be invoked as a justification of torture.<sup>xxiii</sup>

### ***b. Domestic Law***

In October, 1994, the U.S. ratified CAT, making it part of the supreme law of the land under the Supremacy Clause of the Constitution.<sup>xxiv</sup> The treaty came into force the following month,<sup>xxv</sup> but the U.S. attached conditions to its ratification of CAT.<sup>xxvi</sup> These conditions, known as reservations, understanding, and declarations (RUDs), are the means by which the U.S. interprets CAT.

Under its RUDs, the U.S. defines torture as an act that:

must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>xxvii</sup>

Another RUD includes the understanding that Article 2 of CAT is not self-executing; therefore, CAT's provision that acts of torture cannot be justified on the grounds of exigent circumstances, such as the state of war or public emergency or on orders from a superior officer or public authority, is not U.S. law until Congress specifically passes a statute codifying this provision.<sup>xxviii</sup> Further, the U.S. equates "cruel, inhuman or degrading treatment or punishment" in Article 16 of CAT with its "cruel and unusual punishment" ban.<sup>xxix</sup>

While the U.S. has repeatedly taken a strong rhetorical stance against the use of torture, it has taken limited steps to implement its commitments under CAT.<sup>xxx</sup> For example, a RUD to CAT deems the treaty to be non-self-executing. As a result, victims of torture cannot bring a cause of action under CAT.<sup>xxxi</sup> Also, by not making Article 2 of CAT self-executing, the U.S. seems to suggest that it has given itself the ability to torture individuals during times of exigent circumstance. Further, the U.S. has foreclosed the remedy of petitioning the Committee Against Torture by refusing to opt into CAT's individual complaint procedure.<sup>xxxii</sup>

Beyond its RUDs to CAT, the U.S. provides victims of torture limited civil remedies. Recourse for victims of torture abroad is available in the form of civil suits under the Alien Tort Claims Act (aliens only) and the Torture Victims Protection Act (torture under "foreign authority" only), while U.S. criminal law is supposed to cover torture that happens within U.S. territory.<sup>xxxiii</sup>

Another important body of law to mention is Common Article III (CA III) of the Geneva Conventions.<sup>xxxiv</sup> Bush's administration stressed the assumption that the Geneva Conventions did

not apply to the U.S. skirmish with al Qaeda.<sup>xxxv</sup> Nevertheless, the Supreme Court ruled in *Hamdan v. Rumsfeld* that CA III applies to the armed conflict.<sup>xxxvi</sup> In order to solidify this ruling, President Obama, via Executive Order 13491, decreed that CA III serves as a minimum baseline for the standards and practices used during the interrogation of individuals in the custody or control of the U.S. during armed conflict.<sup>xxxvii</sup>

## **Former Interrogation Techniques: A Guantanamo Case Study**

In February 2007, the International Committee of the Red Cross (ICRC) sent a report to John Rizzo, the acting General Counsel for the CIA, admonishing CIA interrogators of the techniques they used on detainees under their care. While CIA detainee holding locations have been kept secret from the public, the ICRC report notes that four detainees believe that prior to their final arrival at Guantanamo, they were held at the Cuban base for periods ranging from one week to one year.<sup>xxxviii</sup> Upon the presumption that CIA officials detained and interrogated high value detainees at Guantanamo, this article will not only look at the interrogation techniques the military used on detainees, but will also focus on the recently released Bush-era memorandums which highlight techniques used by CIA officials.

### **a. CIA Interrogation Techniques**

In this section, only those techniques that are legally questionable are further explained.

(1) *Dietary Manipulation*<sup>xxxix</sup>

(2) *Nudity*: Nudity is used to cause psychological discomfort, particularly if a detainee, for cultural or other reasons, is modest. The detainee may be kept nude during and in-between interrogation sessions; he may not be exposed to temperatures below 68 degrees Fahrenheit; may not be or threatened to be sexually abused; sexual innuendo is to be avoided, but his fear of being seen naked may be exploited (e.g., female officers may be allowed to participate in the interrogation process). Clothing is provided as an incentive to cooperate with CIA officials.<sup>xl</sup>

(3) *Attention Grasp*<sup>xli</sup>

(4) *Walling*<sup>xlii</sup>

(5) *Facial Hold*<sup>xliii</sup>

(6) *Facial Slap or Insult Slap*<sup>xliv</sup>

(7) *Abdominal Slap*<sup>xlv</sup>

(8) *Cramped Confinement*: The individual is placed in a dark confined space, large or small, to restrict movement; the larger space allows him to stand or sit; a smaller space is only large enough for the subject to sit. Confinement is not permitted in the larger space for more than eight hours at a time for no more than 18 hours a day; in the smaller space for more than two hours.<sup>xlvi</sup> A bug may be placed in the confined space to play off of the fears of a detainee (e.g., Abu Zubaydah had a strong fear of insects so a harmless bug was placed in the "box," most likely a non-stinging caterpillar, but he was only told that the insect was non-lethal).<sup>xlvii</sup>

(9) *Wall Standing*<sup>xlviii</sup>

(10) *Stress Positions*: There are three different stress positions used to produce physical discomfort

and muscle fatigue: sitting on the floor with legs extended straight out in front and arms raised above the head; kneeling on the floor while leaning back at a 45 degree angle; and/or leaning against a wall generally about three feet away from the feet, with only the head touching the wall while his wrists are handcuffed in front of or behind his back. An interrogator stands next to him to prevent injury if he loses his balance.<sup>xix</sup>

(11) *Water Dousing*: Cold water is poured on the detainee either from a container or a hose.<sup>i</sup> The maximum period of time that a detainee may be permitted to remain wet is set at two-thirds the time at which hypothermia could be expected to develop.<sup>ii</sup> The interrogator may also flick water at the detainee “in an effort to create a distractive effect to awaken, to startle, to instil humiliation, or to cause temporary insult.”<sup>iii</sup>

(12) *Sleep Deprivation*: The purpose is to weaken the subject, wear down his resistance to questioning, often by handcuffing a standing detainee to a length of chain from the ceiling; hands are shackled in front between the levels of heart and chin; or may be raised above the level of his head for a period of up to two hours; the detainee has approximately a two to three foot diameter of movement; the feet are shackled to the floor. A detainee may be seated and shackled to a small stool which supports his weight, but is too small to permit him to balance himself so as to sleep. He may also be restrained in a horizontal position when necessary to enable recovery from edema without interrupting the course of sleep deprivation. The maximum duration for sleep deprivation authorized by the CIA is 180 hours, after which the detainee must be permitted to sleep without interruption for at least eight hours.<sup>liii</sup>

(13) *Water-boarding*: As noted above, water-boarding occurs when the detainee is strapped onto a gurney inclined at an angle of ten to 15 degrees to the horizontal with the detainee on his back and his head toward the lower end of the gurney. A cloth is placed over the detainee’s face, and cold water or a saline solution is poured on the cloth from a height of approximately six to 18 inches.<sup>liv</sup> A single application of liquid may not last for more than 40 seconds, measured from the moment when the liquid is first poured onto the cloth until the moment the cloth is removed. When the time limit is reached, the pouring is immediately discontinued and the cloth removed to allow him to take three to four full breaths before further interrogation.<sup>lv</sup>

Water-boarding, used to cause fear and panic, may be approved for use during a maximum of one single 30-day period; in a 24 hour period, no more than two sessions of water-boarding and no session may last more than two hours.<sup>lvi</sup> Moreover, during any session, the number of individual applications of water/solution lasting ten seconds or longer may not exceed six; total cumulative time in a 24 hour period may not exceed 12 minutes.<sup>lvii</sup>

Water-boarding does pose a risk of significant medical problems. The detainee may vomit and aspirate the emesis. To reduce this risk, the detainee is placed on a liquid diet a day prior to water-boarding. The detainee may also aspirate on the water poured over the cloth and develop pneumonia. To mitigate this risk, a saline solution is used instead of water. Lastly, the detainee could suffer spasms of the larynx that would prevent him from breathing even when returned to an upright position. To prevent this risk, medical staff is on hand to monitor the water-boarding.<sup>lviii</sup>



## **b. Army Field Manual 34-52**

In this section, only those techniques that are legally questionable are further explained.

- (1) *Direct*<sup>lxix</sup>
- (2) *Incentive/Removal of Incentive*<sup>lx</sup>
- (3) *Emotional Love*<sup>lxi</sup>
- (4) *Emotional Hate*<sup>lxii</sup>
- (5) *Fear-Up Harsh*: Here, the interrogator behaves in an overpowering manner with a loud and threatening voice to convince the detainee that he should be fearful and that he has no option but to cooperate.<sup>lxiii</sup>
- (6) *Fear-Up Mild*: Fear-up mild is a lesser form of fear-up harsh. Instead of throwing objects, banging on tables, and screaming at the detainee, the interrogator may simply use a loud voice to get the detainee's attention and/or remind him that he is in a negative position.<sup>lxiv</sup>
- (7) *Fear-Down Approach*<sup>lxv</sup>
- (8) *Pride and Ego Up*<sup>lxvi</sup>
- (9) *Pride and Ego Down*<sup>lxvii</sup>
- (10) *Futility*<sup>lxviii</sup>
- (11) *We Know All*<sup>lxix</sup>
- (12) *File and Dossier*<sup>lxx</sup>
- (13) *Establish Your Identity*<sup>lxxi</sup>
- (14) *Repetition*<sup>lxxii</sup>
- (15) *Rapid Fire*<sup>lxxiii</sup><sup>lxxiv</sup>
- (16) *Silent*<sup>lxxv</sup>
- (17) *Change of Scenery*<sup>lxxvi</sup>

## **c. Counter-Resistance Techniques in the War on Terrorism Memorandum**

In a memorandum dated April 16, 2003, Secretary of Defense Donald Rumsfeld outlined interrogation techniques that were used by the military but not approved by AFM 34-52. These techniques include:

- (1) *Change of Scenery Down*: The detainee is removed from the interrogation room and placed in a less comfortable setting. This change in scenery would "constitute a substantial change in environmental quality."<sup>lxxvii</sup>
- (2) *Dietary Manipulation*: The interrogator changes the diet of the detainee, but may not deprive him of food or water nor manipulate his diet to the point where there is adverse medical consequences.<sup>lxxviii</sup>
- (3) *Environmental Manipulation*: The environment is altered to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). The detainee cannot be injured.<sup>lxxix</sup>
- (4) *Sleep Adjustment*: The detainee's sleep schedule is changed on a regular basis, (e.g., reversing from night to day). Sleep adjustment is not sleep deprivation.<sup>lxxx</sup>
- (5) *False Flag*: The interrogator convinces the detainee that individuals from a country other than the U.S. are interrogating him.<sup>lxxxi</sup>

- (6) *Isolation*: The detainee is separated from the other detainees, but the conditions of his cell must still comply with basic standards of treatment.<sup>lxxxii</sup>
- (7) *Mutt and Jeff*: The interrogators split into two teams: one very formal and unsympathetic, the other genial and sympathetic. The goal is to make the detainee identify with and feel more obliged to talk to one team instead of the other.<sup>lxxxiii</sup>

#### **d. Legality of the Techniques**

While it is unclear how long the CIA used the interrogation techniques described in the Bush-era memorandums, this article will evaluate the techniques as though they have been used until their abandonment in 2009. Under this assumption, they were being utilized well after the *Hamdan* ruling, which stated that CA III applies to the conflict with al Qaeda. Therefore, when evaluating the legality of their use by CIA interrogators, this article bases its conclusion on whether the procedures violated CAT, U.S. RUDs to CAT, and CA III. However, since the techniques listed in AFM 34-52 were not used beyond 2006, this section will only look at whether the techniques violated CAT, U.S. RUDs to CAT, and the Uniform Code of Military Justice.

##### (1) CIA Interrogation Techniques

The following techniques violated either international law, CAT and CA III, and/or domestic law, U.S. RUDs to CAT.

*Nudity*: Under CA III, detainees may not be exposed “to outrages against personal dignity, in particular humiliating and degrading treatment.”<sup>lxxxiv</sup> As noted in the Bush-era memorandums, CIA interrogators used nudity to cause psychological discomfort in their detainees, especially if the detainee was modest for cultural reasons.<sup>lxxxv</sup> To deepen the detainee’s embarrassment of being nude, interrogators allowed female officers to be present during some interrogations.<sup>lxxxvi</sup> At times, during stages of prolonged nudity, detainees were not allowed to use the bathroom. Therefore, when nudity was combined with the stress position, i.e., shackled in a particular position, the detainee would have to urinate/defecate on himself and remain in that condition for periods at a time.<sup>lxxxvii</sup> Because nudity can cause a detainee to feel humiliated, especially when the technique is combined with other interrogation practices, nudity violates CA III. However, it would be difficult to argue that nudity alone could constitute as torture.

*Confinement + Insect*: The purpose of this technique was to play off of the detainee’s fear of bugs. Confinement + insect was developed because detainee Zubaydah was noticeably terrified of insects; therefore, by placing a bug in Zubaydah’s confined space, such as a box, it was thought he would be more willing to cooperate with his interrogators in order to get out of the box. As noted by Jay Bybee, former Assistant Attorney General, in his memorandum to John Rizzo, if the interrogators did not inform Zubaydah that the insect was a non-lethal or non-stinging insect, then the interrogators would have violated both CAT and domestic law. Under Section 2340 and as defined in the U.S. RUD to Article 1 of CAT, severe mental pain or suffering occurs when there is an “intentional or threatened infliction of severe physical pain or suffering.”<sup>lxxxviii</sup> By lying about the insect’s stinging capabilities, the interrogators would have subjected Zubaydah to severe mental suffering. While confinement + insect would constitute as torture under domestic law if the

interrogators mislead the detainee to believe that the insect was lethal or would cause him physical harm, under international law, confinement + insect would generally constitute as torture. Article 1 of CAT states that torture is an act that causes severe pain or suffering, whether physical or mental.<sup>lxxxix</sup> In this technique, the interrogators would be utilizing the detainee's fear against him. Even if the interrogators informed the detainee that the insect is non-lethal and harmless, the detainee's fear of the insect could still be overwhelming, causing him severe mental suffering.

*Sleep Deprivation:* Under CAT, sleep deprivation could constitute as torture depending on how long the individual was subjected to it. CIA interrogators had the ability to deprive a detainee of sleep for a maximum of 180 hours (seven and a half days). To keep the detainee from sleeping, the interrogator would shackle him in a standing or sitting position.<sup>xc</sup> It was reported that interrogators would use water dousing and loud noises to help keep the sleep deprived detainees awake.<sup>xc<sup>i</sup></sup> During one occasion, one detainee reported that his artificial leg was removed in order to apply more pressure on his healthy leg, causing him to stay awake.<sup>xc<sup>ii</sup></sup>

The obvious strain sleep deprivation has on an individual's mind is what calls this technique into question. Under CAT, any suffering, whether physical or mental, qualifies as torture. One could argue that sleep deprivation beyond a 48 hour period would constitute as torture due to the intense mental fatigue the detainee will experience after being subjected to the technique.

*Water-boarding:* Water-boarding is one of the most controversial techniques formerly used by the CIA. As mentioned, water-boarding causes the detainee to experience the intense sensation of drowning. Water-boarding not only causes the detainee mental anguish, but it can also be deadly. For instance, the procedure could make the detainee's larynx spasm, preventing breathing even after being placed in an upright position. Also, on more than one occasion, water-boarding has caused the detainee to vomit, which could cause choking, or to soil himself. Because of the powerful mental suffering this technique imposes upon the detainee, it is easy for one to conclude that water-boarding is torture under both international and domestic law.

## (2) Military Interrogation Techniques

While some of the military's interrogation techniques might raise a few concerns, the only technique that could be construed as violating international and/or domestic law is the fear-up harsh/fear-up mild approach. When using this method, the interrogator must be extremely careful that he/she does not threaten or coerce the source. Conveying a threat can violate the Uniform Code of Military Justice (UCMJ).<sup>xc<sup>iii</sup></sup> Nevertheless, while fear-up harsh/fear-up mild could be taken to the level where it violates the UCMJ, it would be difficult to prove that this technique could qualify as torture.

## **Aftermath and Amendments**

Individuals within the U.S. and abroad were outraged when they learned about the interrogation techniques used by CIA and military interrogators on detainees. In response, the public and human rights organizations demanded more transparency from the Bush administration. To address the public's concern and give more guidance to its troops, the U.S. government passed the Detainee Treatment Act in 2005.<sup>xc<sup>iv</sup></sup> Furthermore, AFM 34-52 was replaced in September 2006 with

AFM 2-22.3. However, this did not significantly change how the military conducted its interrogations as most of the techniques in AFM 34-52 were adopted by the new manual. The new manual also implemented and developed three of the interrogation recommendations – Mutt and Jeff, False Flag, and Isolation – Rumsfeld suggested in his 2003 memorandum. Nevertheless, the new manual solidified the notion that the interrogation techniques listed in the manual were the only procedures military interrogators could use on detainees; it became the sole authority on how to interrogate captured individuals.

Due to a recent change in events, the field manual's interrogation standards and regulations are no longer solely limited to the military. In Executive Order 13491, President Obama declared that any interrogation technique not listed in the Army field manual was banned for use in intelligence operations.<sup>xcv</sup> The executive order binds the CIA to follow those techniques listed in AFM 2-22.3 during times of armed conflict.<sup>xcvi</sup> Because both the CIA and the military are currently obligated to follow the interrogation standards in the Army field manual, it is important to evaluate the field manual's techniques to determine whether any procedure could constitute as torture.

The following interrogation techniques were incorporated in the new field manual.

#### **a. Army Field Manual 2-22.3**

(1) *Emotional Fear-Up Approach (replacing Fear-Up Harsh/Mild)*: A preexisting fear is identified or created; a plan is presented to eliminate it if the detainee cooperates.<sup>xcvii</sup> Now instead of "scaring" him into compliance, his identified fear is used toward the interrogator's benefit.<sup>xcviii</sup>

(2) *Separation (replacing Isolation)*: While complying with the basic standards of humane treatment, the detainee is removed from others and their environment. The technique is restricted to specific unlawful enemy combatants and is limited to 30 days.<sup>xcix</sup> The only difference between Rumsfeld's suggested isolation technique and separation is that separation may only be used on unlawful enemy combatants.<sup>c</sup>

#### **b. Legality of the New Techniques**

As noted, AFM 2-22.3 was adopted in 2006. Since CA III was determined to apply to the U.S. skirmish with al Qaeda, this section will evaluate whether any interrogation techniques could violate the principles established in the Geneva article.<sup>ci</sup>

##### (1) Current Techniques Used by the CIA and Military

*Pride and Ego Down*: CA III states that a person may not be exposed to outrages upon their personal dignity or their sense of personal worth.<sup>cii</sup> Therefore, when using this technique, the interrogator must be careful not to attack the detainee's dignity to the point where he feels utterly humiliated. Nevertheless, this technique would not constitute as torture.

*Futility*: Futility encourages the interrogator to make the detainee feel as if all hope is lost. Again, when using this approach, the interrogator must make sure not to tear down the detainee to the point where he loses his dignity. This technique would not qualify as torture.

*Separation*: While separation does not per se violate CA III, it is important to note that separation may no longer be used by the CIA or the military. In March 2009, President Obama

announced that his administration was abandoning the term “unlawful enemy combatant.”<sup>ciii</sup> Since separation may only be used on “specific unlawful enemy combatants,” the technique is currently unusable.<sup>civ</sup>

## Looking Forward

President Obama’s declassification of four Bush-era memorandums dubbed the “Torture Memos,” has brought the issue of torture back into the public’s mind, and has raised some important questions that we need to address. Should our nation use questionable interrogation procedures in order to potentially gain information that could save our citizens from a terrorist attack? A recent Gallup poll suggested that 55 percent of Americans were in favor of using harsh interrogation methods against terrorists, while 36 percent said the techniques were not justified. Of those who said they had followed the story very closely, 61 percent supported such techniques versus 37 percent who did not.<sup>cv</sup>

If these techniques were in fact beneficial remains questionable. Advocates of the techniques, such as former Vice President Dick Cheney, believe that they were helpful because they produced needed information about al Qaeda. However, opponents quickly point to the fact that much of the information gained from the detainees was given prior to the commencement of harsh interrogation techniques. Nevertheless, as President Obama so poignantly asked, is it worth losing our morals over this information?

Under CAT, member states are not only supposed to prevent acts of torture, but they are also required to prevent “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”<sup>cvi</sup> While only a handful of the interrogation procedures used by the CIA could be defined as torture, other methods fall into the category of cruel and degrading. Such treatment not only violates our obligations under international treaties, but it also opens our citizens to great risk. Other nations could argue that they should be allowed to treat U.S. citizens in the same way. Further, it has been proven throughout history that enhanced interrogation techniques do not work because individuals will give their interrogators false information in order to stop the interrogation.

As a nation it is important that we reassess the techniques used prior to 2009 in order to ensure they are never used again. We must learn from our mistakes and begin to heal and move forward. We must amend the Detainee Treatment Act to incorporate Executive Order 13491; this will help solidify the notion that all intelligence investigations will be subject to the regulations found in the Army field manual. We must make sure that interrogators are well trained and versed in both domestic and international law to prevent events such as Abu Ghraib and Guantanamo from occurring in the future. With more guidance and oversight, our interrogators will know when they have crossed the thin line between what is legal and what violates international and domestic law.

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<sup>i</sup> See generally Memorandum for John A. Rizzo on Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005) [hereinafter Memo 4]. Kate Bolduan & Terry Frieden, 2002 memo: *Had to be intent to inflict ‘severe pain’ to be torture*, CNN.COM, Apr. 3, 2009, available at <http://www.cnn.com/2009/POLITICS/04/16/us.torture.documents/index.html>; *President Obama’s Statement on the*

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Memos, N.Y. TIMES, Apr. 16, 2009, available at [http://www.nytimes.com/2009/04/16/us/politics/16text-obama.html?\\_r=2](http://www.nytimes.com/2009/04/16/us/politics/16text-obama.html?_r=2).

<sup>ii</sup> Under the Bush administration, CIA sources described at least six enhanced interrogation techniques that were instituted in mid-March 2002 and used on a dozen top al Qaeda targets who were incarcerated at secret locations on military bases in regions from Asia to Eastern Europe.

<sup>iii</sup> Memorandum for John Rizzo on Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter Memo 1].

<sup>iv</sup> *Id.*

<sup>v</sup> *Id.*

<sup>vi</sup> Brian Ross & Richard Eposito, *CIA's Harsh Interrogation Techniques Described: Sources Say Agency's Tactics Lead to Questionable Confessions, Sometimes to Death*, ABC NEWS, Nov. 19, 2005, available at <http://abcnews.go.com/wnt/investigation/story?id=1322866>.

<sup>vii</sup> *Id.*

<sup>viii</sup> *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, available at <http://abcnews.go.com/wnt/investigation/story?id=1356870>.

<sup>ix</sup> *Id.* See also Open Letter to Attorney General Alberto Gonzales, available at <http://www.hrw.org/english/docs/2006/04/06/usdom13130.htm>.

<sup>x</sup> *Poll Results: Waterboarding is Torture*, CNN.COM, Nov. 6, 2007, available at <http://www.cnn.com/2007/POLITICS/11/06/waterboard.poll/index.html>.

<sup>xi</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-165.

<sup>xii</sup> The CIA also prohibited the practice of water-boarding in 2006 and claimed that the technique has not been used since 2003.

<sup>xiii</sup> Exec. Order No. 13491.

<sup>xiv</sup> Techniques used pre-2006.

<sup>xv</sup> Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521, 534 (2004).

<sup>xvi</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 9, 1975, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp38.htm](http://www.unhchr.ch/html/menu3/b/h_comp38.htm). See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 4-9 (Oxford University Press 2000) (1987).

<sup>xvii</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly Dec. 19, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) [hereinafter CAT] (including both the U.S. ratification as well as the original treaty from 1984).

<sup>xviii</sup> See RODLEY, *supra* note 16, at 65 (noting although the prohibition against torture existed, the need for effective means of enforcement sparked the creation of CAT); see also Senate Comm. on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 3 (1990) (“The Convention codifies international law as it has evolved, particularly in the 1970s, on the subject of torture...”).

<sup>xix</sup> BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 257 (Hotei Publishing 1996) (indicating the universal practice of condemning torture, but also remarking that many governments continue to tolerate torture despite these norms); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 12 (Martinus Nijhoff Publishers 1988) (stating the prohibition against torture is a universally valid rule that can be considered a peremptory norm as defined by Article 53 of the Vienna Convention on the Law of Treaties); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 316 (2003) (asserting despite the conventions which guard against torture, it evolved into a jus cogens norm due to “fundamental moral perceptions of the international community”).

<sup>xx</sup> Other important international treaties and documents include: the Geneva Conventions; International Covenant on Civil and Political Rights; Convention on the Prevention and Punishment of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child. Regional treaties include: the European Convention for the Protection of Human Rights and Fundamental Freedoms; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; and the Inter-American Convention to Prevent and Punish Torture. The Rome Statute of the recently created International Criminal Court

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prohibits torture as a crime against humanity and a war crime. See RODLEY, *supra* note 16, at 47 (establishing 105 states ratified or acceded to CAT, which also may be considered to apply to all states under general international law).

<sup>xxi</sup> CAT, *supra* note 17, art. 1.

<sup>xxii</sup> *Id.*, art. 16.

<sup>xxiii</sup> *Id.*, art. 2(2).

<sup>xxiv</sup> U.S. Const. art. VI, cl. 2 (stating that the Constitution, laws made pursuant to the Constitution, “and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

<sup>xxv</sup> U.S. Dep’t of State, Office of the Legal Adviser, Treaty Affairs, Treaties in Force: a List of Treaties and Other Int’l Agreements of the U.S. in Force as of Jan. 1, 2000, 472 (2000), *available at*

[http://www.state.gov/www/global/legal\\_affairs/tifindex.html](http://www.state.gov/www/global/legal_affairs/tifindex.html).

<sup>xxvi</sup> U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (Oct. 27, 1990) [hereinafter RUDs] (establishing those reservations that modify the CAT).

<sup>xxvii</sup> RUDs, *supra* note 26, at Understanding 1(a). The United States contends that their understanding of CAT “did not modify the meaning of Article 1, but rather clarified it, adding the precision required by the U.S. domestic law.” Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States of America, Comm. Against Torture, 24th Sess., Summary Record of the First Part of the 427th mtg. P 6, CAT/C/SR.427 (2000) [hereinafter U.S. Report to Committee Against Torture] (statement of Mr. Yeomans--USA) (defending the U.S. decision to “clarify” Article 1 of CAT with the inclusion of a specific intent requirement), *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.SR.427.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.SR.427.En?Opendocument).

<sup>xxviii</sup> Working Group Report On Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>.

<sup>xxix</sup> *Id.*; U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>xxx</sup> In its report to the Committee Against Torture, the United States proclaimed: “[t]orture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a ‘state of public emergency’) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.” U.S. Report to Committee Against Torture, *supra* note 27.

<sup>xxxi</sup> Keller, *supra* note 15, at 545.

<sup>xxxii</sup> *Id.* See CAT, *supra* note 17, art. 22 (providing a “State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.” “No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.”).

<sup>xxxiii</sup> U.S. legislation takes a piecemeal approach to torture. The United States “considered existing law to be adequate

to its obligations under the Convention and determined that it would not be appropriate to establish a new federal cause of action, or to ‘federalize’ existing state protections, through adoption of omnibus implementing legislation.” Congress did, however, pass legislation criminalizing acts of torture outside the United States. United States Criminal Code, Section 2340 et seq. criminalizes acts of torture committed outside U.S. territorial jurisdiction by a U.S. national or by an alleged offender who is present in the United States. U.S. Dep’t of State, Initial Report of the United States of America to the U.N. Committee Against Torture (1999).

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<sup>xxxiv</sup> “(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.” CA III of the Geneva Conventions, *available at* <http://www.icrc.org/ihl.nsf/WebART/365-570006?OpenDocument> [hereinafter CA III].

<sup>xxxv</sup> See Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003) [hereinafter Resistance Memo].

<sup>xxxvi</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>xxxvii</sup> Exec. Order, *supra* note 13.

<sup>xxxviii</sup> Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (ICRC February 2007) [hereinafter ICRC Report].

<sup>xxxix</sup> Memorandum for John A. Rizzo on Re: Application of 18 U.S.C. 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005) [hereinafter Memo 2].

<sup>xl</sup> *Id.*; ICRC Report, *supra* note 38, pg. 14.

<sup>xli</sup> Memo 2, *supra* note 39; Memo 1, *supra* note 3.

<sup>xlii</sup> *Id.*

<sup>xliii</sup> *Id.*

<sup>xliv</sup> *Id.*

<sup>xlv</sup> Memo 2, *supra* note 39.

<sup>xlvi</sup> Memo 2, *supra* note 39; Memo 1, *supra* note 3.

<sup>xlvii</sup> Memo 1, *supra* note 3.

<sup>xlviii</sup> Memo 2, *supra* note 39; Memo 1, *supra* note 3.

<sup>xlix</sup> *Id.*

<sup>1</sup> The interrogator must conduct water dousing in such a manner as to avoid the inhalation or ingestion of water by the detainee.

<sup>ii</sup> For water temperature of 41 degrees Fahrenheit, total duration of exposure may not exceed 20 minutes without drying and rewarming. For water temperature of 50 degrees Fahrenheit, total duration of exposure may not exceed 40 minutes without drying and rewarming. For water temperature of 59 degrees Fahrenheit, total duration of exposure may not exceed 60 minutes without drying and rewarming. Memo 2, *supra* note 39.

<sup>iii</sup> *Id.*

<sup>iiii</sup> Memo 2, *supra* note 39; Memo 1, *supra* note 3.

<sup>lv</sup> A saline solution is used if interrogators believe the detainee will try to drink the water that is poured over his face. By using the solution, it reduces the risk of the detainee from developing hyponatremia – reduced concentration of sodium in the blood.

<sup>lv</sup> Memo 1, *supra* note 3.

<sup>lvi</sup> Session is defined to mean the time that the detainee is strapped to the water-board.

<sup>lvii</sup> Both the newly released ICRC report and the Bush-era memorandums state that three high level al Qaeda detainees were water-boarded, two of which were water-boarded numerous times. Abu Zubaydah was water-boarded 83 times, while Khalid Sheikh Mohammed was water-boarded 183 times in March 2003. Upon reviewing the guidelines used to structure how often water-boarding may be used upon detainees, one must question if these rules were actually followed. Memo 4, *supra* note 1; Memo 2, *supra* note 39; ICRC Report, *supra* note 38; *Memo: Two al Qaeda leaders waterboarded 266 times*, CNN.COM, Apr. 20, 2009, *available at* <http://www.cnn.com/2009/POLITICS/04/20/cia.waterboarding/index.html>.

<sup>lviii</sup> Memo 2, *supra* note 39; Memo 1, *supra* note 3; Memo 4, *supra* note 1.

<sup>lix</sup> Army Field Manual 34-52 (Sept. 28, 1992).

<sup>lx</sup> *Id.*

<sup>lxi</sup> *Id.*

<sup>lxii</sup> *Id.*



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- lxiii *Id.*
- lxiv Army Field Manual 34-52, *supra* note 59.
- lxv *Id.*
- lxvi *Id.*
- lxvii *Id.*
- lxviii *Id.*
- lxix Army Field Manual 34-52, *supra* note 59.
- lxx *Id.*
- lxxi *Id.*
- lxxii *Id.*
- lxxiii *Id.*
- lxxiv Army Field Manual 34-52, *supra* note 59.
- lxxv *Id.*
- lxxvi *Id.*
- lxxvii Resistance Memo, *supra* note 35.
- lxxviii *Id.*
- lxxix *Id.*
- lxxx *Id.*
- lxxxi *Id.*
- lxxxii Resistance Memo, *supra* note 35.
- lxxxiii *Id.*
- lxxxiv CA III, *supra* note 34.
- lxxxv Memo 2, *supra* note 39; ICRC Report, *supra* note 38, pg. 14.
- lxxxvi *Id.*
- lxxxvii ICRC Report, *supra* note 38, pg. 20.
- lxxxviii RUDs, *supra* note 26, at Understanding 1(a); Memo 1, *supra* note 3.
- lxxxix CAT, *supra* note 21, art 1.
- xc Memo 2, *supra* note 39; ICRC Report, *supra* note 38, at pg. 11.
- xc<sup>i</sup> ICRC Report, *supra* note 38, at pg. 11.
- xc<sup>ii</sup> *Id.*
- xc<sup>iii</sup> Army Field Manual 34-52, *supra* note 59.
- xc<sup>iv</sup> Under the Detainee Treatment Act, no person in the custody or control of the Department of Defense shall be subject to any treatment not authorized by and listed in the Army Field Manual. Prior to the Detainee Treatment Act, non-Field Manual techniques used only against “unlawful combatants.” STEPHEN DYCUS, WILLIAM C. BANKS & PETER RAVEN-HANSEN, COUNTERTERRORISM LAW 443-44 (Aspen Publishers 2007).
- xc<sup>v</sup> Exec. Order, *supra* note 13.
- xc<sup>vi</sup> *Id.*
- xc<sup>vii</sup> Army Field Manual 2-22.3 (Sept. 2006).
- xc<sup>viii</sup> *See Id.*; Army Field Manual 34-52, *supra* note 59.
- xc<sup>ix</sup> Subsequent periods of separation must be approved. Army Field Manual 2-22.3, *supra* note 97.
- <sup>c</sup> *See* Resistance Memo, *supra* note 35; Army Field Manual 2-22.3, *supra* note 97.
- <sup>ci</sup> This section will not evaluate whether the new field manual techniques violate CAT, U.S. RUDs to CAT, or the UCMJ because these questions were already addressed in a previous section.
- <sup>cii</sup> CA III, *supra* note 34.
- <sup>ciii</sup> William Glaberson, *U.S. Won’t Label Terror Suspects as ‘Combatants,’* N.Y. TIMES, Mar. 13, 2008, available at <http://www.nytimes.com/2009/03/14/us/politics/14gitmo.html>.
- <sup>civ</sup> Army Field Manual 2-22.3, *supra* note 97.
- <sup>cv</sup> Greg Pierce, *Detainee Poll*, WASHINGTON TIMES, Apr. 28, 2009, at pg. 8.
- <sup>cvi</sup> CAT, *supra* note 17, art 1.